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State of Utah v. Rueben Ross : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880650-CA
v.	:	
RUEBEN ROSS,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF FORGERY, A FELONY IN THE SECOND DEGREE, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (SUPP. 1988), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOHN A. ROKCIH, JUDGE, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of forgery, a felony in the second degree, in violation of Utah Code Ann. § 76-6-501 (Supp. 1988), following a jury trial in Third District Court, in and for Salt Lake County, the Honorable John A. Rokich, judge, presiding. This Court has jurisdiction in this case pursuant to Utah Code Ann. § 77-35-26(2)(a) (Supp. 1988) and Utah Code Ann. § 78-2a-3(2)(e) (1988).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the trial court properly admitted evidence of defendant's prior attempted forgery conviction under Utah R. Evid. 609 to impeach his credibility.

2. Whether a statement of the prosecutor, in which she asked for a recess to allow the witness to compose herself and mentioned that the witness had had a death in the family, was improper and so prejudicial as to warrant a new trial.

3. Whether the evidence was sufficient to convict defendant of forgery.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-501 (Supp. 1988):

Forgery - "Writing" defined.

(1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

(a) Alters any writing of another without his authority or utters any such altered writing; or

(b) Makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section "writing" includes printing or any other method of recording information, checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification.

(3) Forgery is a felony of the second degree if the writing is or purports to be:

(a) A security, revenue stamp, or any other instrument or writing issued by the government, or any agency thereof; or

(b) A check with a face amount of $100 or more, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

(4) Forgery is a felony of the third degree if the writing is or purports to be a check with a face amount of less than $100, all other forgery is a class A misdemeanor.

Utah R. Evid. 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 609:

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted os a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject or a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other

than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilty or innocence.

(e) **Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

STATEMENT OF THE CASE

Defendant, Rueben Ross, was convicted of forgery in violation of Utah Code Ann. § 76-6-501 (Supp. 1988), a felony of the second degree, following a jury trial in the Third Judicial District Court, in and for Salt Lake County, State of Utah. He was sentenced to imprisonment in the Utah State Prison for a term of not less than one year nor more than fifteen years.

STATEMENT OF THE FACTS

On or about July 8, 1988, a checkbook was taken from the desk of James Quigley, located in his office at 1750 University Club Building (T. 4-6). The checks were drawn on the trust account of James and Anne Quigley (T. 24, 91).

On July 9, 1988, the defendant met Jeannie Hunter at a convenience store. Ms. Hunter aggreed to give defendant a ride to a liquor store in return for gas money (T. 14). After going to the liquor store (T. 18-19, 90), defendant did not have the money to pay Ms. Hunter for gas, and requested her assistance in helping him cash a check, which he claimed was from his grandmother (T. 19, 90). Ms. Hunter told defendant that she only had one form of I.D. and that it would be difficult to cash the two-party check. Defendant told Ms. Hunter that Check Mart would

cash a check with no identification (T. 20). Defendant led Ms. Hunter to a house (T. 21, 91), where he procured a check, drawn on the account of James and Anne Quigley, made out to Ms. Hunter for two hundred dollars (T. 24, 91).

Ms. Hunter and defendant drove to Check Mart. As they were entering the building, defendant suggested that Ms. Hunter tell the teller that the check was from Ms. Hunter's grandmother (T. 27). Ms. Hunter presented the check, and the teller had Ms. Hunter endorse and place a thumbprint on the back of the check (T. 76). When asked who the check was from, defendant responded "our grandmother" T. 78, 103). When it was pointed out, because of the obvious racial difference between Ms. Hunter and defendant, that this was biologically unlikely, Ms. Hunter told the teller that it was from her grandmother (T. 78).

The teller suspected the check was a forgery and contacted the police (T. 78). When the police entered the building they saw defendant look over his shoulder at them, and try to hide something in the waistband of his pants (T. 110). Police frisked the defendant and found the checkbook stolen from the Quigley's in the waistband of his pants (T. 111).

Defendant's testimony contradicted that of Ms. Hunter. He claims that he met Ms. Hunter at the convenience store and offered to pay her gas money if she would take him to pick up his paycheck (T. 163). According to defendant, Ms. Hunter asked him if he would help her cash a check (T. 169). They went to the home of defendant's mother to cash the check (T. 169). She could not cash the check (T. 170). Defendant then suggested Ms. Hunter could cash the check at Check Mart (T. 171).

Upon leaving his mother's house, defendant next claims that Ms. Hunter dropped a checkbook on the lawn that he picked up and put in the waistband of his pants (T. 171).

Defendant went to Check Mart with Ms. Hunter, but denied making any statements to the teller (T. 175). Defendant's testimony also contradicted the testimony of the arresting officer; he denied hiding the checkbook in the waistband of his pants (T. 197).

SUMMARY OF THE ARGUMENT

The trial court correctly ruled, on defendant's motion in limine, that evidence of a prior conviction for attempted forgery was admissible to impeach credibility. Forgery is a crime involving dishonesty or false statement, and is automatically admissible pursuant to Utah R. Evid 609(a)(2). Crimes that fall within the ambit of 609(a)(2) are not subject to the general balancing provision of Utah R. Evid. 609(a)(1) or 403. Crimes involving dishonesty or false statement are always admissible for impeachment purposes.

Defendant has failed to preserve for appeal a claim of prosecutorial misconduct, as he failed to make a timely and specific objection at trial. The statement was not of such a character that it could be considered plain error. Therefore, this Court should refuse to consider the issue on appeal. Alternatively, the innocuous statement of the prosecutor was not probably used by the jurors in making their decision.

The evidence was sufficient to establish that defendant was guilty of forgery.

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN ALLOWING EVIDENCE OF A PRIOR CONVICTION FOR ATTEMPTED FORGERY TO IMPEACH DEFENDANT'S CREDIBILITY.

A. Evidence of prior attempted forgery conviction is admissible under Utah R. Evid. 609(a)(2).

The trial court correctly ruled, on defendant's motion in limine, that evidence of a prior conviction for attempted forgery was admissible to impeach credibility. In deciding evidentiary issues, the trial court exercises broad discretionary powers. State v. Gentry, 747 P.2d 1032, 1035 (Utah 1987). Accordingly, the reviewing court should not reverse the trial court's rulings on those matters unless "it is manifest that the court so abused its discretion that there is a likelihood that injustice resulted." Id. at 1035. Utah R. Evid. 609 controls the admissibliity of prior convictions for impeachment purposes. The rule states:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Defendant avers that it is unclear whether the trial judge allowed the evidence under subsection 1 or 2 of Rule 609 (a). It seems fairly clear from the record that evidence of the

prior attempted forgery conviction was allowed under subsection (2), as a crime invloving dishonesty or false statement. Trial counsel attempted to classify the forgery conviction as a theft or robbery offense, which would not fall within the ambit of 609 (a)(2). (Transcript of Hearing [hereinafter T.H.] 7, 8). The trial court correctly ruled that forgery does not fit into this classification. The trial judge recognized that forgery is a crime involving deception, and bears directly on the accused's propensity to testify truthfully (T.H. 9).

While this Court has not directly ruled on whether forgery is a crime involving dishonesty or false statement it has noted that "Utah's Rule 609 is the federal rule verbatim and advised that federal case law should be consulted for advice in interpreting the rule." State v. Wight, 765 P.2d 12, 17 (Utah App. 1988), citing State v. Banner, 717 P.2d 1325, 1333-34 (Utah 1986).

In United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976), the Ninth Circuit reversed a district court ruling that two forgery convictions were not admissible for impeachment purposes. Judge Kennedy held that "[t]hese convictions should . . . have been admitted to impeach Porter. Since forgery is a crime involving 'dishonesty or false statement', see e.g. United States v. DiLorenzo, 429 F.2d 216 (2d Cir. 1970), cert. denied, 402 U.S. 950, 91 S.Ct. 1609, 29 L.Ed.2d 120 (1971), and since the convictions were less than ten years old, their admissiblity at the trial is governed by Rule 609(a)(2)." Dixon at 1083. Likewise, in United States v. Bay, 762 F.2d 1314, 1317 (9th Cir.

1984) the court found that "[e]vidence of a conviction of forgery, which is a crime involving dishonesty and false statement, is mandatorily admissible for impeachment purposes." See also United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980) ("prior conviction for forgery, a crime involving fraudulent falsification, was properly admissible").

As this Court pointed out in Wight, "there is still much disagreement among cases and commentators about which crimes are usable for [credibility] purposes' under 609 (a)(2)." Wight at 17. While not many federal circuit court decisions have specifcally ruled on this question, it seems settled that forgery is considered a crime involving dishonesty or false statement. Perhaps the dearth of decisions can be attributed to the fact that this is not a close question. The decisions interpreting 609(a)(2) have typically dealt with crimes which do not readily fit into this classification. The cases cited by defendant in his brief are all robbery-theft-burglary cases.

In United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976), the court explored the meaning of the term "dishonesty or false statement." In finding that robbery is not a crime involving dishonesty or false statement, the court looked to the legislative record to determine congressional intent regarding Rule 609(a)(2):

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on

> the accused's propensity to testify truthfully. H.R.Conf.Rep.No. 93-1597, 93d Cong., 2d Sess. 9, reprinted in [1974] U.S.Code Cong. & Admin.News, pp. 7098,7103.

Id. at 362. Crimen falsi is a creature of Roman law originated to curtail the practice of forging, altering or destroying wills. The term was later expanded to include every species of fraud and deceit. Id. at 362 n.26. Crimen falsi at common law was "any crime which rendered the perpetrator incompetent to be a witness, such as forgery, perjury, subornation of perjury and other crimes affecting the administration of justice." Black's Law Dictionary 335 (5th ed. 1979) (emphasis added). Aside from perjury, it is hard to think of a crime which more directly bears on the veracity of an individual to testify truthfully than does forgery.

Defendant next argues that according to Wight, 609(a)(1) must be applied if the trial court does not make an inquiry into the facts of the prior conviction. This is incorrect. As the State reads Wight, an inquiry into the facts is at the discretion of the court. In Wight no inquiry was made into the facts of a robbery conviction to determine if dishonesty or false statement was present. Since the court determined that robbery is not a crime of dishonesty or false statement, the court applied 609(a)(1). The characteristics of some crimes are such that this type of inquiry becomes unnecessary. In those cases, "Congress has substituted its judgment that evidence of such crimes is always sufficiently related to credibility to justify its admission." Smith at 358-9. Any type of fraudulent activity would fall under this rubric, including forgery.

Defendant concedes that forgery involves fraudulent conduct, but attempts to make a distinction betweeen forgery and attempted forgery (AB. at 8). Defendant is reiterating an argument that was made at trial; the trial judge rejected this argument based on his finding that the previous conviction was the result of a plea, which he felt was probably a reduced charge (T.H. 9). Additionally, the judge was given a copy of the police report involved in the prior conviction (T.H. 13). This Court should likewise reject this distinction.

Assuming forgery is a crime of dishonesty or false statement, application of the test set forth in State v. Banner, 717 P.2d 1325, 1334 (Utah 1986), becomes unnecessary. "By its terms, Rule 609(a)(2) affords the trial court no discretion to exclude evidence of convictions of a crime involving dishonesty or false statement." Dixon 547 F.2d at 1083.[1]

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[1] Should the Court decide to evaluate the prior conviction under subsection (1) of Rule 609, the Banner test becomes applicable. Pursuant to Banner the following five factors need to be considered in deciding whether evidence of prior convictions is more probative than prejudicial: [1] The nature of the crime, as bearing on the character for veracity of the witness; [2] the recentness or remoteness of the prior conviction; [3] the similarity of the prior crime to the charged crime, insofar as a close resemblance may lead the jury to punish the accused as a bad person; [4] the importance of credibility issues in determining the truth in a prosecution tried without the decisive nontestimonial evidence; and [5] the importance of the accused's testimony, as perhaps warranting the exclusion of convictions probative of the accused's character for veracity. In the instant case, application of the five factors would still weigh in favor of admitting evidence of the prior conviction. Admittedly, the third factor would weigh against admission. However, this factor alone is insufficient to conclude that in admitting the evidence, the trial court so abused its discretion that "there is a likelihood that injustice resulted."

B. Evidence offered under Rule 609(a)(2) is not subject to the general balancing provision of Rule 403.

All federal circuits that have ruled on this specific question have held that the courts have no discretion to exclude, as unduly prejudicial, evidence that a witness had been previously convicted of a crime involving dishonesty or false statement. Given the plain language of rule 609(a)(2), and the clear record of legislative intent, this interpretation is correct. Defendant would disregard these prior decisions, even though this Court has found that "federal case law should be consulted for advice in interpreting the rule." Wight at 16, citing Banner at 1333-34.

Utah R. Evid. 403 is a general rule "designed as a guide for the handling of situations for which no specific rules have been formulated." See United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981) (quoting Fed. R. Evid. 403 advisory committee note). Rule 403 was not designed to override more specific rules, such as 609(a). Id. See also United States v. Wong, 703 F.2d 65 (3d Cir. 1983), cert. denied 464 U.S 842 (1983); United States v. Toney, 615 F.2d 277 (5th Cir. 1980), cert. denied 449 U.S 985 (1980); United States v. Levya, 659 F.2d 118 (9th Cir. 1981), cert. denied 454 U.S. 1156 (1982). "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling." Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932) (citations ommitted).

Defendant's reliance on Utah Supreme Court decisions which hold that Rule 403 may be applied after a finding that evidence of prior bad acts is admissible under Rule 404(b) is misplaced. Rule 404(b) states that evidence of prior bad acts may be admissible upon a finding by the court. The language of Rule 609(a)(2) is not discretionary. Rule 609(a)(2) mandates that evidence that a witness has been convicted of a crime shall be admitted if the crime involved dishonesty or false statement.

As this Court has recognized, Rule 609 is the "result of compromise between those who believe that all criminal convictions are relevant on the issue of credibility and those who urge that there should be limits to particular types of criminal convictions." Wight at 17. The Court in Toney observed, "[c]ongress carefully and extensively considered the prior crimes impeachment issue, devoting more time to it than any other rule of evidence. See J. Weinstein & M. Berger, supra. [3 J. Weinstein & M. Berger, Evidence 609 [03a], at 609-73 (1978)]." Toney at 280. The jurisdictions that have considered this specific question have extensively reviewed the legislative history. Defendant would have this Court accept that every court to consider the matter has misinterpreted both the unambiguous statutory language and the legislative history.

Defendant points to a statement by Representative Lott during a debate on one of the drafts of the rule (A.B. 17,18). Representative Lott suggested that Rule 403 would be applicable if evidence of all prior felony convictions were admissible to impeach credibility. Rule 609 went through numerous drafts and

revisions in both the House and the Senate. It is to one of these early drafts that Representative Lott's comments would seem to apply. Clearly, the final version of the rule does not allow evidence of all prior felony convictions. The legislative history also points to an early version of the rule which included a subsection (3), which would have explicitly granted trial judges discretion to exclude evidence of crimes involving dishonesty or false statement if they determined that their probative value was substantially outweighed by their prejudicial effect. See Kiendra at 354, 355; Wong at 67. This test is identical to Rule 403.[2] If Congress had intended this test to apply to crimes involving dishonesty or false statement, this provision would have remained. The Kiendra court points out:

> Rule 609(a) received extensive scrutiny in both chambers of Congress and underwent many modifications before the final compromise was struck in Conference Committee. Significantly, none of the six different proposals that were suggested by different committees, subcommittees and full houses called for the restoration of paragraph 3 from the Revised Draft.

Id. at 355 (footnote omitted).

Like every other court to consider this question, this Court should be "driven by the force of explicit statutory language and legislative history to hold that evidence offered under Rule 609(a)(2) is not subject to the general balancing provision of Rule 403." Id. at 354.

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[2] 1. The Advisory Committee's note described proposed section 609(a)(3) as "a particularized application" of Rule 403. Kiendra at 355, n.3, citing 51 F.R.D. 315, 393 (1971).

POINT II

THE PROSECUTOR'S STATEMENT WHEN REQUESTING A RECESS WAS NOT ERROR.

This Court need not reach the merits of this claim as defendant failed to make a timely objection to the prosecutor's comment, which is mandated by Utah R. Evid. 103(a). In State v Shickles, 760 P.2d 291, 301 (Utah 1988), the defendant attempted to raise on appeal a claim of prosecutorial misconduct, to which no timely and specific objection had been made at trial. The Utah Supreme Court held that the issue was not properly before the Court, and that defendant was precluded from raising the issue on appeal. Likewise, this Court should refuse to hear this issue on appeal.

During the course of Jeannie Hunter's testimony, she explained what occurred when the police came to Check Mart and she and defendant were arrested. The following testimony was elicited:

> Q [By the prosecutor] And how did you feel about that when you were in there, when they took your son?
>
> A [By Ms. Hunter] When they took my son and my son saw them put handcuffs on me and they took him to the Detention Center, I was extremely angry. I felt so stupid and so -- so stupid for trying to help him. I just did. I just can't believe that he would just let me take my son there, just let me take my son there like that.
> Rueben, why did you do that?
>
> [Defense counsel] I ask that the witness be admonished to answer the questions and not --
>
> The Witness: I'm sorry, I apologize. Let me take a minute to calm down. (Weeps.)

> [Prosecutor] I was going to say the State has no further questions at this time, your Honor. Miss Hunter has recently had a death in her family and I wonder if we could have a recess.
>
> The Court: Court will be in recess. Remember the admonishment, ladies and gentlemen of the jury, don't talk to each other or anyone else about this case, don't form any opinions or do any investigating. I will have Mr. Tingey come and bring you back when it is time to return.
>
> (Recess taken.)

(T. 33-34.)

The innocuous comment of the prosecutor does not fall within the plain error exception of rule 103(d). For a finding of plain error two requirements must be met:

> (1) That the error be "plain", i.e., from our examination of the record, we must be able to say that it should have been obvious to a trial court that it was committing error and;
>
> (2) That the error affect the substantial rights of the accused, i.e., that the error be harmful. . . .

State v. Eldredge, 101 Utah Adv. Rep. 15, 18 (Utah Feb. 1, 1989) (citations ommittted) (footnote omitted).

Defendant fails to meet either prong of the Eldredge requirement. First, it is not clear to the State at this point that the prosecutor's statement constituted error of any kind. The statement was made when the prosecutor was requesting a recess in order for the witness to compose herself. Defendant claims that the prosecutor made this statement in an attempt to garner sympathy for the witness. It appears that the prosecutor

would have elicited more sympathy for the defendant if she had allowed the emotional outburst of the witness to go unexplained. In the context of the trial, the jury would have assumed the witness was crying solely because she had been used by the defendant. In any case, the error would clearly not have been obvious to a trial court.

Evaluation of the second requirement becomes unnecessary, as the statement was not "plain" error. Nevertheless, the error did not have a substantial impact on the verdict. The prosecutor's statement that the witness had a death in the family added nothing to the credibility of the witness. If, as defendant claims, the essence of this case involved the question for the jury as to which witness was more believable, a statement which might elicit sympathy for a witness would add nothing to their credibility. Because the alleged error does not fall witin the ambit of rule 103(d) this court should refuse to consider the issue.

Should the Court decide to reach the merits of this claim, State v. Valdez, 30 Utah2d 54, 513 P.2d 422, 426 (1973) established the rule governing reversals for improper statements of counsel:

> The test of whether the remarks made by counsel are so objectionable as to merit reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks.

While a death in the witness' family is not relevant to the issues, it is not something that is contemplated by the first prong (jurors would not be "justified" in considering fact) of the Valdez test. However, arguably, the jury would not be justified in considering a death in the witness' family, in determining their verdict. Nevertheless, the second prong of the test has not been met. Under the circumstances of this case, the jurors were probably not influenced by the remarks of the prosecutor. Defendant's contention seems to be that the statement was made in an attempt to inflame the jury. Given the innocuous nature of the statement this argument is untenable. Defendant goes on to claim that the statement had a greater impact "because it was presented to the jurors as if it were an accepted fact, without giving Mr. Ross the opportunity to cross-examine the witness" (A.B. 22). The State is uncertain how this would give the statement greater impact, nor what cross-examination would have revealed. Defendant also ignores the fact that defense counsel cross-examined the witness directly after the recess. This Court should find that under the circumstances of this case that the jurors were not influenced by the comments of the prosecutor.

POINT III

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT DEFENDANT'S GUILT OF FORGERY.

Defendant claims that the evidence produced at trial was insufficient to convict of forgery. The Utah Supreme Court pointed out in State v. Booker, 709 P.2d 342 (Utah 1985), that

when a defendant claims the evidence is insufficient to sustain his conviction, and appellate court should limit the scope of its review.

> [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. State v. Petree, Utah, 659 P.2d 443, 444 (1983); accord State v. McCardell, Utah, 652 P.2d 942, 945 (1982). In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses...." State v. Lamm, Utah, 606 P.2d 229, 231 (1980); accord State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can be made, our inquiry stops. . . .

Id. at 345. This Court has also succinctly stated that unless there is a clear showing by the appellant of lack of evidence, the jury verdict will be upheld. State v. Gabaldon, 735 P.2d 410, 412 (Utah App. 1987); State v. One 1982 Silver Honda Motorcycle, 735 P.2d 392, 393-94 (Utah App. 1987).

Utah Code Ann. § 76-6-501 (1978), sets out the elements of forgery. This section provides in pertinent part:

> 76-6-501. Forgery--"Writing" defined.
> (1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:
> (a) Alters any writing of another without his authority or utters and such altered writing; or
> (b) Makes, completes, executes, outhenticates, issues, transfers,

> publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transferrrence, publication or utterance purports to be the act of another, whether the person is existent or nonexistent.
>
> . . . .
>
> (3) Forgery is a felony of the second degree if the writing is or purports to be:
>
> . . . .
>
> (b) A check with a face amount of $100 or more. . . .

The evidence in this case is sufficient to establish beyond a reasonable doubt that with the intent to defraud Check Mart, defendant issued a check, purported to be signed by James Quigley, to Jeannie Hunter for $200.00.

Defendant met Ms. Hunter at a convenience store on July 9, 1988 (T. 14). He enlisted her help in cashing a check which he claimed was from his grandmother (T. 19). Defendant gave Ms. Hunter a check which had been stolen the night before. The check was made out Ms. Hunter for $200.00 and had two forged signatures on the front (T. 5, 6, 24). Defendant accompanied Ms. Hunter to Check Mart to cash the check. While entering the building, defendant encouraged Ms. Hunter to misrepresent that the checking account was in the name of her grandparents. When questioned by the teller, defendant claimed that it was from his grandmother.

Defendant bases his claim on conflicting testimony. As stated above, where the testimony conflicts, "it is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses." State v. Lamm, 606 P.2d at 231. The evidence supports the jury's conclusion that defendant was guilty of forgery. The evidence was not so insubstantial or

lacking that a reasonable person would not have reached a guilty verdict beyond a reasonable doubt. Gabaldon, 735 P.2d at 412.

CONCLUSION

The defendant, Rueben Ross, was properly convicted of forgery, a second degree felony. For the foregoing reasons, and any additional reasons advanced at oral argument, the State of Utah respectfully requests that this Court affirm defendant's conviction.

RESPECTFULLY submitted this 12th day of June, 1989.

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Attorney General

Dan R. Larsen for BB

BARBARA BEARNSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Lisa J. Remal and Joan C. Watt, Salt Lake Legal Defender Assoc., 424 East 500 South, Salt Lake City, Utah 84111, this 12th day of June, 1989.

Dan R Larsen for BB